



ELLIOTT INVESTMENT MANAGEMENT L.P.
360 S ROSEMARY AVE, 18TH FLOOR, WEST PALM BEACH, FL 33401

Via Electronic Mail

September 18, 2023

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Effect of *Grayscale Investments, LLC v. SEC*, 2023 WL 5536704 (D.C. Cir. 2023), on Pending Release Nos. 34-93784, 33-11030, 34-94211, 34-99762

Dear Secretary Countryman:

Elliott Investment Management L.P. (“Elliott”) submits this letter to address the effect of the D.C. Circuit’s recent decision in *Grayscale Investments, LLC v. SEC*,¹ on the Commission’s pending Rule 10B-1 and Section 13(d) rulemaking proceedings.² This letter supplements the comment letters Elliott previously filed regarding the Rule 10B-1 and Section 13(d) Proposals.³ Although the D.C. Circuit issued its *Grayscale Investments*

¹ 2023 WL 5536704 (D.C. Cir. Aug. 29, 2023).

² See File No. S7-32-10; Proposed Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions, Release No. 34-93784 (Dec. 15, 2021) (“Rule 10B-1 Proposal”); File No. S7-06-22; Modernization of Beneficial Ownership Reporting, Release Nos. 33-11030, 34-94211 (Feb. 10, 2022) (“Section 13(d) Proposal”); File No. S7-06-22; Reopening of Comment Period for Modernization of Beneficial Ownership Reporting; Release Nos. 33-11080, 34-97405 (Apr. 28, 2023) (“DERA 13(d) Memorandum”); File No. S7-23-10; Reopening of Comment Period for Position reporting of Large Security-Based Swap Positions, Release No. 34-99762 (Jun. 20, 2023) (“DERA 10B-1 Memorandum”).

³ Elliott has submitted the following letters from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, related to the Rule 10B-1 rulemaking proceedings: Letter requesting an extension of the comment period for the Rule 10B-1 Proposing Release (Jan. 13, 2022); Letter re: Release No 34-93784 (Mar. 21, 2022) (“Initial Rule 10B-1 Letter”); Letter re: Effect of *West Virginia v. EPA* on Pending Release Nos. 34-93784, 33-11030, and 34-94211 (Aug. 18, 2022) (“First Supplemental Rule 10B-1 Comment Letter”); Letter re: Release No. 34-99762 (Aug. 21, 2023) (“Second Supplemental 10B-1 Comment Letter”) (collectively, “Rule 10B-1 Comment Letters”). Elliott has also submitted the following letters from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, related to the Section 13(d) rulemaking proceedings: Letter re: Release Nos. 33-11030, 34-94211 (Apr. 11, 2022) (“Initial 13(d) Comment Letter”); Letter re: Effect of *West Virginia v. EPA* on Pending Release Nos. 34-93784, 33-11030, and 34-94211 (Aug.

decision after the relevant comment periods closed, the decision is based on a “fundamental principle of administrative law” that applies to all federal agency actions, including the Rule 10B-1 and Section 13(d) proceedings.⁴ As such, *Grayscale Investments* merits the Commission’s careful attention—the decision validates the concerns Elliott has raised regarding the Proposals in previous comment letters, and it emphasizes the Commission’s need to abandon the Proposals, or at a minimum significantly amend them to adopt a considerably narrower confidential disclosure regime.

Our Rule 10B-1 and Section 13(d) Comment Letters highlighted the Commission’s inconsistent treatment of similarly situated investor groups. The Initial Rule 10B-1 Letter, for example, explained that the Commission failed to consider reasonable alternatives to the Rule 10B-1 Proposal, such as a confidential reporting structure.⁵ That failure was particularly acute, we underscored, because the Commission’s proposed rule governing short sale disclosures—a proposal issued contemporaneously with the Rule 10B-1 and Section 13(d) Proposals—*would* permit anonymized disclosures, or even reduced disclosures, to protect the confidentiality of short sellers and their investment strategies.⁶ We explained that the Commission’s Short Sale Reporting Proposal was “far more cognizant” that public disclosure requirements could decrease short seller incentives to “produce fundamental research” by publicizing information that could “cause prices to adjust to the information that the short seller uncovered before the short seller is able to acquire [its] full desired position.”⁷ Likewise, we pointed out that the Short Sale Reporting Proposal recognized the risk of retaliation from public disclosures of proprietary trading positions.⁸ Although these concerns and consequences apply equally to the Commission’s proposals to make security-based swap (“SBS”) positions public, the Commission arbitrarily discounted them in the activist-investor context. Our supplemental Rule 10B-1 and Section 13(d) Comment Letters, and the exhibits attached thereto, reiterated these points.⁹

18, 2022) (“First Supplemental 13(d) Comment Letter”); Letter re: Response to the Comment Letter Submitted by Wachtell, Lipton, Rosen and Katz on October 4, 2022 (Nov. 18, 2022) (“Second Supplemental 13(d) Comment Letter”); Letter re: DERA Rule 10B-1 Memorandum relating to the 13(d) Rulemaking Proposal (June 27, 2023) (“Third Supplemental 13(d) Comment Letter”) (collectively, “Section 13(d) Comment Letters”).

⁴ 2023 WL 5536704, at *1.

⁵ Initial 10B-1 Letter, at 21.

⁶ *Id.*; see also Short Position and Short Activity Reporting by Institutional Investment Managers; Notice of Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-related Data Collection, 87 Fed. Reg. 14950, at Section IV (Mar. 16, 2022) (the “Short Sale Reporting Proposal”).

⁷ Initial 10B-1 Letter, at 24 n.63 (quoting Short Sale Reporting Proposal, at text accompanying note 269).

⁸ *Id.*

⁹ See, e.g., Initial 10B-1 Letter, Ex. B, Craig Lewis, Review of the Economic Analysis for Proposed Rule 10B-1 on the “Position Reporting of Large Security-Based Swap Positions, at 4 & n.11 (Mar. 21, 2022) (“Lewis Report”) (noting the striking differences between ... [t]he Commission’s decision to apprise the public about the negative economic consequences regarding corporate governance, predatory trading, and investors’ incentives to trade in contemporaneous rules but not in the [10B-1] Proposed Rule”); Lewis

Because the Commission has not “treat[ed] like cases alike,”¹⁰ *Grayscale Investments* poses a significant obstacle to the Commission’s Rule 10B-1 and Section 13(d) Proposals. In that case, the D.C. Circuit held that the Commission had acted unlawfully by treating materially similarly bitcoin-related funds inconsistently.¹¹ The Commission had approved bitcoin futures funds for trading in national exchanges, yet it denied approval for a highly correlated bitcoin spot market fund that is “materially similar, across the relevant regulatory factors.”¹² Because the Petitioner had “plausibly alleg[ed that] it ha[d] received inconsistent treatment under the same rule or standard,” the court proceeded to “consider whether the [Commission] had offered a reasonable and coherent explanation for the seemingly inconsistent results.”¹³

The Commission’s reasoning in *Grayscale Investments* fell short of that standard. Among other things, the Commission inexplicably “discount[ed]” and “ignore[d]” the “obvious” and undisputed evidence of similarity between the bitcoin funds.¹⁴ The Commission also “offered no compelling reason why” one factor was “central” to its denial of the bitcoin spot market fund, yet “unnecessary” to its approval of the other similar bitcoin futures funds,¹⁵ and the “reason[s]” the Commission gave for approving the bitcoin futures funds “applie[d] equally to” the bitcoin spot market fund it denied.¹⁶ In short, the Commission “[l]ack[ed] a reasonable and coherent explanation for these seemingly inconsistent results,” rendering its decision “arbitrary and capricious.”¹⁷

Report, at 10 (explaining the Rule 10B-1 Proposal failed to identify the necessity of public position reporting despite the Proposed Short Sale Rule reaching the opposite conclusion); *Id.* at 15–17, 22 (pointing out the Proposed Short Sale Rule’s focus on the inefficiency of faster-than-optimal trading, liquidity protections from delayed disclosure, reduced incentives of gathering market information, and the unnecessary of disclosing investor identity to advance public transparency, and the Rule 10B-1 Proposal’s total failure to acknowledge these concerns in the SBS position reporting context); *see also* Initial 13(d) Comment Letter, at 30–31 & n.121 (highlighting the Proposed Short Sale Rule’s confidentiality protections to avoid “vitiat[ing] the value of [short sellers’] research” and the Commission’s failure to explain “why the research and analysis of a short seller is entitled to protection and does not constitute material non-public information about the company it is shorting, while the research and analysis of an activist is somehow characterized differently”); *see also* Second Supplemental 10B-1 Comment Letter, at 8 n.25 (noting the Commission’s protection of “short sellers” without “entitl[ing]” activists “to similar protection despite the similarity in the value of their proprietary trading strategies and the damage to that value that public disclosure would cause”); *id.* at 10 (critiquing the Commission’s and DERA’s failure to explain the “different treatment” of “activists” and “hostile bidders, short-sellers or other investors with a view as to the prospects of a public company” (cleaned up)); *id.* at 10 n.32 (Commission failed to explain “why one category of investor is entitled to confidentiality while another is not”).

¹⁰ 2023 WL 5536704, at *1.

¹¹ *Id.*

¹² *Id.* at *4–5.

¹³ *Id.* at *4 (cleaned up).

¹⁴ *Id.* at *6.

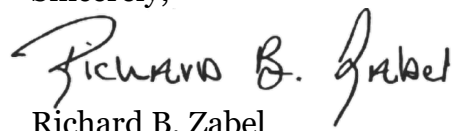
¹⁵ *Id.* at *7.

¹⁶ *Id.* at *8.

¹⁷ *Id.* at *9.

Because *Grayscale Investments* turns on “black letter administrative law,”¹⁸ the Commission’s reasoning in its Rule 10B-1 and Section 13(d) rulemakings will be scrutinized under the same standards. And as we have explained, the Commission has not provided a “reasonable and coherent explanation for ... inconsistent[ly]” requiring public disclosure of SBS positions but not short positions held by similarly situated investor groups, and the reasons the Commission has given for bypassing short seller public disclosure requirements “appl[y] equally to” activist investors and the disclosure of SBS positions.¹⁹ Indeed, this differing treatment of short sellers and activists only further supports our view, which we have explicitly and repeatedly set forth, that the Rule 10B-1 and Section 13(d) Proposals demonstrate a bias against, and an effort to impede, activists. Treating short seller strategies as deserving of proprietary confidentiality but not doing the same for activist strategies is “arbitrary and capricious.”²⁰ *Grayscale Investments* thus underscores another fundamental flaw in the Commission’s Rule 10B-1 and Section 13(d) Proposals and the need for a different approach. Elliott continues to respectfully request that the Commission abandon the Proposals or, at a minimum, significantly amend them by adopting a narrower confidential disclosure regime.

Sincerely,



Richard B. Zabel

General Counsel & Chief Legal Officer
Elliott Investment Management L.P.
360 S. Rosemary Avenue, 18th Floor
West Palm Beach, FL 33401

cc: The Hon. Gary Gensler, SEC Chair
The Hon. Caroline A. Crenshaw, SEC Commissioner
The Hon. Jaime Lizárraga, SEC Commissioner
The Hon. Hester M. Peirce, SEC Commissioner
The Hon. Mark T. Uyeda, SEC Commissioner

¹⁸ *Id.* at *3 (cleaned up).

¹⁹ *Id.* at *8, 9; *see also supra* note 7 and accompanying text.

²⁰ *See id.* at *9.